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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/014,977	12/10/2001	Michael Evan Webber	260/289	3321
34026	7590	05/19/2005	EXAMINER	
JONES DAY			NASSER, ROBERT L	
555 WEST FIFTH STREET, SUITE 4600			ART UNIT	
LOS ANGELES, CA 90013-1025			PAPER NUMBER	

3736

DATE MAILED: 05/19/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

10/014,977

Applicant(s)

WEBBER, MICHAEL EVAN

Examiner

Robert L. Nasser

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 25 April 2005.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1,4-6,8-11,13,14,17-22,24-26,29-34,36,37 and 39-42 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,4-6,8-11,13,14,17-22,24-26,29-34,36,37 and 39-42 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- ☒ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- ☐ Notice of Informal Patent Application (PTO-152)
- ☐ Other: \_\_\_\_\_

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The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1, 4-6, 8, 10, 11, 13, 14, 17, and 19 are rejected under 435 U.S.C. 103(a) as being obvious over Kiefer et al 3830630 in view of Forrester et al 537655 and Phillipps et al 5482068. With respect to claims 1, 4-6, 8, 10, 11, 13, 14, 17 and 19, Kiefer teaches method of analyzing alveolar breath by expiring breath into a chamber, continuously monitoring the concentration of carbon dioxide in the expired breath with a detector 17, and when the carbon dioxide level reaches 4.5%, triggering the measurement of alcohol concentration in the alveolar breath. Neither the carbon dioxide nor the alcohol measurements are done optically. Forrester et al further teaches a similar measuring arrangement using the carbon dioxide concentration to trigger the measurement of alcohol concentration, where both the carbon dioxide and alcohol levels are done optically. Hence, it would have been obvious to modify Kiefer et al to use optical measurements, as it is merely the substitution of one known equivalent sensing method for another. The combination does not base the trigger threshold on previous measurements. Phillipps et al a breath monitoring device where a threshold is updated based on only the immediately previous patient measurement, to tune the device to the particular patient. Hence, it would have been obvious to modify the above

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combination to update the threshold based on previous measurements, in order to allow the device to be fine tuned to each patient.

Claims 20, 21, 22, 24-26, 29, 31-34, 36, 37, 39, 40, and 42 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kiefer et al in view of Forester et al and Phillipps et al as applied to claims 1, 4-6, 8, 10, 11, 13, 14, 17, and 19 above, and further in view of Gratton et al 6192261. With regard to claims 20, 21, 22, 24-26, 29, 31-34, 36, 37, 39, 40, and 42, the only remaining difference is that applicant recites that the two light signals are multiplexed. Gratton et al teaches in figure 4, that which is well known in this field, i.e. that it is known to multiplex signals of different wavelengths for measurement. Hence, it would have been obvious to modify the above combination to multiplex the signals, as it is the substitution of one equivalent measurement technique for another.

Claims 1, 4-6, 8, 9, 11, 13, 14, 17, and 18 are rejected under 35 U.S.C. 103(a) as being obvious over Gustafsson et al 6038913 in view of Kiefer, Forrester et al and Phillipps et al. With respect to claims 1, 4-6, 8, 9, 11, 13, 14, 17 and 18, Gustafsson teaches a method of measuring NO in alveolar air using spectrophotometric techniques. It does not teach a method of ensuring that only alveolar breath components are measured. Kiefer teaches method of analyzing alveolar breath by expiring breath into a chamber, continuously monitoring the concentration of carbon dioxide in the expired breath with a detector 17, and when the carbon dioxide level reaches 4.5%, triggering the measurement of alcohol concentration in the alveolar breath. The carbon dioxide measurement is not done optically. Forrester et al further teaches a similar measuring

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arrangement using the carbon dioxide concentration to trigger the measurement of alcohol concentration, where the carbon dioxide levels are measured optically. Hence, it would have been obvious to modify Kiefer et al to use optical measurements, as it is merely the substitution of one known equivalent sensing method for another. The combination does not base the trigger threshold on previous measurements. Culver et al teaches a breath monitoring device where a threshold is update based on previous patient measurements, to tune the device to the particular patient. Hence, it would have been obvious to modify the above combination to update the threshold based on previous measurements, in order to allow the device to be fine tuned to each patient.

Claims 20, 21, 22, 24-26, 29, 30, 32-34, 36, 37, 39, 41, and 42 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gustafsson et al in view of Kiefer et al and Forester et al and Culver et al as applied to claims 1, 4-6, 8, 9, 11, 13, 14, 17, and 18 above, and further in view of Gratton et al. With regard to claims 20, 21, 22, 24-26, 29, 30, 32-34, 36, 37, 39, 40, and 41, the only remaining difference is that applicant recites that the two light signals are multiplexed. Gratton et al teaches in figure 4, that which is well known in this field, i.e. that it is known to multiplex signals of different wavelengths for measurement. Hence, it would have been obvious to modify the above combination to multiplex the signals, as it is the substitution of one equivalent measurement technique for another.

Applicant's arguments filed 4/25/2005 have been fully considered but they are moot in view of the new grounds of rejection.

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Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robert L. Nasser whose telephone number is (571) 272-4731. The examiner can normally be reached on Mon-Fri, variable hours.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Max Hindenburg can be reached on (571) 272-4726. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Robert L. Nasser  
Primary Examiner  
Art Unit 3736

RLN  
May 16, 2005



ROBERT L. NASSER  
PRIMARY EXAMINER